complains, and leave untouched the rule at common law which after the half-century of conflict (if one may borrow the expression) following *Irons* v. *Smallpiece* (3 B. & Ald. 551) is, there is reason to hope, at last settled.

THE VALUE OF HONEST INTENTIONS. In *Nash* v. *Minnesota Title & Insurance Co.* (40 N. E. R. 1039), an action of deceit, a majority of the Supreme Judicial Court of Massachusetts decided that a defendant who had written a letter reasonably to be understood as warranting a title, might show that the letter was intended to convey another meaning. In this opinion the majority follows *Derry* v. *Peek*, 14 App. Cas. 337 (noted in 3 HARVARD LAW REVIEW, 231). Field, C. J., and Holmes, J., dissented, arguing, as does Sir Frederick Pollock in 5 Law Quar. Rev. 410, that a man should be bound by a reasonable interpretation of his words when he knows others will act upon them. Though not cited by the Court, a *dictum* in *Litchfield* v. *Hutchinson*, 117 Mass. 195, also appears to support this view.

There seems little doubt that the decision of the majority is right on historical grounds, but whether it is in thorough touch with the trend of the law, is a dubious question. The present tendency certainly seems to be in favor of requiring moral fraud for deceit, on the ground that it is hard to subject the honest giver of gratuitous information to the determination of the jury as to its good sense; yet in the case of a gratuitous bailee more than mere honesty is required, and the two cases are not easily distinguishable. The ground of the decision, therefore, probably lies as much as anywhere in the greater hesitation of the courts to give security to the seeker of information than to the possessor of property rights.

RETREATING TO THE WALL.— *Beard* v. *United States*, 15 Sup. Ct. Rep. 962, is a recent case which has perhaps attracted more attention than its actual decision warrants. The defendant was feloniously assailed and killed his man without "retreating to the wall." The substance of the charge in the court below was that if he could have avoided taking life by getting out of the way, he was guilty of manslaughter. On error, this charge, which takes no account of what may have reasonably appeared necessary to the prisoner at the time of the killing, was very naturally held erroneous by the Supreme Court, and the judgment reversed.

On the facts of the case the decision seems unexceptionable; namely, that when a man is murderously assaulted, he need not pause and speculate as to whether retreat would be safe and expedient, but is entitled to meet the attack with such force as he honestly believes, and has reasonable ground to believe, is necessary to save his life or protect himself from serious injury. It is the *dicta* in Mr. Justice Harlan's opinion, however, which, although quite unnecessary to the decision, have attracted such wide attention. Their general purport is that in case of a *felonious* assault the doctrine of retreating to the wall does not apply. On this point the Court shows a leaning toward the view held by Bishop and Wharton and other dissenters from the old doctrine of the common law. Nevertheless, the earlier view, supported by equal authority, seems more consistent with principle. Resistance to an assault, where life is not involved, may be allowed in kind; but killing to prevent a felony, in this as in other cases, should be justifiable only where no other reasonable

means of prevention is apparent. Though the assailant is a criminal, it is not the province of his intended victim to mete out punishment. His right is merely that of self-defence, and if retreat is an apparently reasonable means of exerting that right, then the sanctity of human life should be respected.

A QUESTION OF JURISPRUDENCE — While the careful demarcation of the regions of contract and tort is generally regarded as a mere scholasticism, it has in England — owing to the County Courts Act of 1846, which taxes costs differently as the action is "founded on contract or tort" — become a living issue. The essential element of contract being the *consensus*, and that of tort the universal duty to refrain from injury, the question arises in which category shall a duty to act, imposed by law, such as the carrier's obligation to receive and carry safely, be placed. Clearly it is neither a tort, a duty to refrain, nor a contract, a voluntary obligation, but an entirely different thing, a legal duty, — a relation which has found no expression in the forms of action, and must, therefore, be dealt with as either a contract or tort. In this country legal duties have been treated, generally, as torts (*Ames* v. *Ry.*, 117 Mass. 541), while in England the authorities have differed widely, some regarding cases of this character as founded on contract, others, the most recent cases, as founded on tort, "the view which prevails in all the earlier authorities, and which underlay the action of assumpsit itself" (11 L. Q. R. 214). In the two latest cases on the subject, *Taylor* v. *M., S. & L. Ry.* '95 1 Q. B. 134, 64 L. J. Q, B. 6 (commented on in 8 HARVARD LAW REVIEW, 290), and *Kelly* v. *Met. Ry.* '95, 1 Q. B. 944, the Court of Appeal has maintained the latter view and has arrived at the result that an action against a railroad company for an injury received, is, whether a contract exist or not, one founded on tort, within the meaning of the County Courts Act. In the former case, the negligence was a positive misfeasance, in the latter, a mere omission, so that a very wide field is covered by these two decisions.

If they are to stand as law, a very radical change will, probably, ensue. The case of *Alton* v. *Midland Ry. Co.* 19 C. B. N. S. 213, deciding that a master cannot recover for loss of a servant's services, caused by the negligence of a railway company, when the contract of carriage is with the servant, — a case already tottering (Pollock on Torts, 446–447), — must now be considered as overruled; and a surprisingly large number of old cases, involving important points, will probably be unable to bear examination in the light of these decisions. The effect will not be confined to the subject of jurisprudence merely, but will have a great influence throughout the whole field of substantive law. Its theoretic correctness, on the other hand, may, perhaps, be doubted. There are certainly high authorities who oppose this view (Holland, Jurisprudence, 223–224), although it seems, after all, to be the better one. A legal duty resembles a tort very much, except that one is affirmative and the other negative; while between a contract, whose very essence is a voluntary personal relation, and a legal duty, an obligation forced on a party against his will, there is little in common. Granting this, a farther problem remains, how to treat those situations in which, presupposing a previous relation founded on contract, the parties find themselves under duties imposed by law practically similar to those which they have contracted to perform, as in ordinary bailment. This is not, perhaps, to be